Filed 3/15/19 P. v. J.R. CA5
Opinion after recalling remittitur and vacating opinion filed on 3/28/18

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. J.R., Defendant and Appellant.	F073686 (Super. Ct. No. CRM022497B) **OPINION**

APPEAL from a judgment of the Superior Court of Merced County. Ronald W. Hansen, Judge.

Law Offices of John F. Schuck and John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra and Kamala D. Harris, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein, Peter H. Smith and Stephanie A. Mitchell, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant, J.R., was born in 1996. In 2011, at the age of 14 years, eight months, J.R. participated in the shootings of multiple individuals during two separate incidents.

He was prosecuted as an adult and convicted on three counts of attempted premeditated murder, two counts of active participation in a criminal street gang, and one count of conspiracy to commit murder. The trial court imposed an aggregate prison sentence of 120 years to life.

J.R. challenges the sufficiency of the evidence with regard to his conspiracy conviction. We conclude the verdict was supported by substantial evidence. In his opening brief, he makes additional claims concerning presentence conduct credits and the need to document information relevant to future youth offender parole hearings under Penal Code section 3051 (all further statutory references are to the Penal Code). However, the latter claims are moot in light of certain changes in the law that occurred during the pendency of this appeal.

In supplemental briefing, J.R. argues for retroactive application of the Public Safety and Rehabilitation Act of 2016 (Proposition 57) and of Senate Bill No. 620 (2017–2018 Reg. Sess.) (SB 620) (Stats. 2017, ch. 682, § 2, eff. Jan. 1, 2018). The People concede the SB 620 claim but initially disputed J.R.'s contentions with regard to Proposition 57. The decision in *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299 (*Lara*) resolves the Proposition 57 issue in J.R.'s favor.

On September 30, 2018, Governor Brown approved Senate Bill No. 1391 (2017–2018 Reg. Sess.) (SB 1391) (Stats. 2018, ch. 1012, § 1), which amended Proposition 57 by prohibiting the criminal prosecution of juvenile offenders for felonies committed prior to the age of 16 years. The legislation went into effect on January 1, 2019, and the parties agree it applies retroactively to cases not yet final on appeal. In light of *Lara*, we accept this argument and remand the case to the juvenile court for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

J.R. was charged by information with attempted premeditated murder (§§ 187, 189, 664 [counts 1, 2 & 4]); active participation in a criminal street gang (§ 186.22, subd. (a) [counts 3 & 5]); and conspiracy to commit murder (§§ 182, subd. (a)(1), 187

[count 6]). There were enhancement allegations of gang-related conduct (§ 186.22, subd. (b)(1)(C) [counts 1, 2 & 4]) and personal use of a firearm with proximate causation of great bodily injury (§ 12022.53, subd. (d) [counts 1, 2, 4 & 6]). The case was tried before a jury. Viewed in the light most favorable to the judgment, the trial evidence established the following facts.

There is a criminal street gang known as the Nortenos that is active in Merced County and other regions of California. The gang identifies with the color red, and its primary activities include narcotics trafficking and gun violence. The Nortenos are enemies of a gang called the Surenos, which identifies with the color blue. Members of these rival groups frequently commit acts of violence against each other.

In early 2011, the California Department of Justice (DOJ) investigated the activities of Norteno gang members in Los Banos and other parts of Merced County. "Operation Red Zone," as it was dubbed by participating agents, involved undercover surveillance and the wiretapping of phones used by certain individuals, including Gonzalo Esquivel, Kenneth Hernandez, and appellant J.R. Esquivel, then age 30, was a "high-ranking member" of the Nortenos and controlled the gang's distribution of narcotics in and through the cities of Livingston, Los Banos, and Merced. Hernandez was one of Esquivel's top lieutenants. As explained by one of the DOJ agents, Hernandez, then age 28, "was Gonzalo Esquivel's number two in Los Banos. … [H]e was pretty much Gonzalo's main narcotics distributor in Los Banos, and then he also had a bunch of younger [Nortenos] that reported to him and would go out and do shootings." J.R. was "a lower-level gang member" who sold cocaine and other drugs in and around Los Banos.

On April 9, 2011, A.E. (victim #1) and P.P. (victim #2) were shot while walking along D Street in Los Banos. Victim #1 was a Norteno associate with extensive family connections to the gang, but she happened to be wearing a blue windbreaker that evening. Apparently mistaken for a Sureno, she was struck by two bullets in the hip and stomach.

Victim #2 was a former Sureno, i.e., a "dropout," who still had a penchant for blue clothing. He wore a blue shirt on the night in question, and consequently suffered a gunshot wound to the hand.

Although the victims were acquainted, their physical proximity to one another at the time of the shooting was coincidental. Victim #1 had just parted ways with her mother to visit someone in a nearby apartment, and victim #2 lived in that apartment complex. They were shot while heading toward the building at the same time.

Victim #1 saw J.R. shoot at her and later identified him in court as the perpetrator. She recognized him from having "hung out with the same circle of people," i.e., mutual Norteno acquaintances. She testified that J.R. fled the scene in a red Jeep Wrangler driven by Kenneth Hernandez. Hernandez was a former classmate whom she had known for many years.

Victim #1 and her mother both saw the red Jeep circling through the area immediately prior to the shooting. The mother said it had gone "around the corner … three to four times" at a normal speed and then rapidly accelerated after the shots were fired. There were four people inside of the vehicle, but she could not identify them. A third eyewitness also testified to having seen the shooter flee in a red Jeep.

Undercover officers had seen Hernandez driving a red Jeep during the week of the shooting and wrote down the license plate number. The vehicle was traced back to a rental car company. Business records and testimony from a company employee confirmed Hernandez was a frequent customer and had rented a white sedan in Los Banos on April 4, 2011. He later exchanged the sedan for a red Jeep Wrangler, which he returned to the company's branch location in Madera on April 10, 2011, the day after the shooting. The Jeep was impounded and searched, which led to the discovery of Hernandez's and J.R.'s fingerprints on the interior and exterior of the vehicle.

As documented on the DOJ wiretap recordings, Hernandez later talked to Esquivel about what happened on D Street and confirmed that J.R. was the shooter. The incident

caused discord among various gang members after the relatives of victim #1 learned of what J.R. had done. Hernandez lamented to Esquivel that J.R. had been bragging about it and acting like a "macho man."

The charges in counts 1, 2, 3, and 6 were based on the facts summarized above. On April 10, 2011, a third victim was shot in the face while socializing with relatives outside of a residence in Los Banos. J.R. claimed responsibility for that shooting during a recorded telephone call with Esquivel. This incident formed the basis for counts 4 and 5, and it is not relevant to the issues raised on appeal.

J.R. was convicted on all counts and the enhancement allegations were found to be true. He was sentenced to consecutive prison terms of 40 years to life for the attempted murder convictions, i.e., 15 to life for each offense plus 25 to life for each firearm enhancement, resulting in a total term of 120 years to life. Punishment for active participation in a criminal street gang, conspiracy to commit murder, and the gang enhancements was stayed pursuant to section 654.

In an unpublished opinion issued on March 28, 2018, this court conditionally reversed the judgment and remanded for further proceedings in accordance with Proposition 57. We later granted a motion to recall the remittitur to address the aforementioned SB 620 issue, which had been inadvertently omitted from the first opinion. Following the Governor's approval of SB 1391, we granted J.R.'s request to file supplemental briefing on the question of its application to this case.

DISCUSSION

Sufficiency of the Evidence (Count 6)

J.R. seeks reversal of the conspiracy conviction on grounds there was no evidence of an unlawful agreement between him, Kenneth Hernandez, and/or other unidentified co-conspirators. He further complains that two of the three "overt acts" upon which the People relied to prove the charge were immaterial. For the reasons that follow, we reject the claim.

Standard of Review

" 'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] We determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.] In so doing, a reviewing court 'presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' " (*People v. Edwards* (2013) 57 Cal.4th 658, 715.)

Law and Analysis

"The crime of conspiracy is defined … as 'two or more persons conspir[ing]' '[t]o commit any crime,' together with proof of the commission of an overt act 'by one or more of the parties to such agreement' in furtherance thereof." (*People v. Swain* (1996) 12 Cal.4th 593, 600, quoting §§ 182, subd. (a)(1), 184.) "The extent of the assent of minds which are involved in a conspiracy may be, and from the secrecy of the crime usually must be, inferred by the jury from the proofs of the facts and circumstances which, when taken together, apparently indicate that they are parts to the same complete whole." (*Lorenson v. Superior Court* (1950) 35 Cal.2d 49, 57–58.) Put differently, "direct evidence is not required to prove a common unlawful design and agreement to work toward a common purpose; the existence of a conspiracy may be inferred as well from circumstantial evidence." (*People v. Buckman* (1960) 186 Cal.App.2d 38, 46–47.) Moreover, "[c]ircumstantial evidence often is the only means to prove conspiracy." (*In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 999.)

J.R. submits there is "no evidence that [he] ever talked with anyone before the incident about murdering anyone or that any such agreement was ever reached." In

essence, he argues the trial evidence was open to interpretation. For example, it is possible J.R. asked to be let out of the car without making Hernandez aware of his intention to shoot at victims #1 and #2, and that Hernandez was merely an accessory after the fact. However, " '[i]f the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.' " (*People v. Thomas* (1992) 2 Cal.4th 489, 514.) "The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Mincey* (1992) 2 Cal.4th 408, 432.)

The People's gang expert testified that Nortenos often use stolen or rented cars when engaging in gun violence to minimize the risk of being identified in connection with such crimes. Witness testimony and the wiretap recordings showed Hernandez rented and drove the vehicle used in the subject incident, and that he had facilitated the transfer of firearms between different gang members during the relevant time period. It was apparent from various recordings that J.R., then age 14, did not personally own a firearm. Therefore, he would have needed someone else to provide him with a gun and transportation in order to carry out the attack on victims #1 and #2. The fact Hernandez drove the Jeep around the block several times before the shooting occurred is reasonably interpreted as reconnoitering, thus indicating his advance knowledge of, and complicity in, J.R.'s plan to shoot and kill rival gang members.

It is a close issue, but we are satisfied that a reasonable juror, considering the evidence as a whole, could have been convinced beyond a reasonable doubt that Hernandez and J.R. entered into an agreement to commit the target offense of attempted murder. The jury also permissibly found that two overt acts were committed in

furtherance of their agreement: Hernandez drove J.R. to the scene of the crime and J.R. shot at the victims. Therefore, all elements of the offense were satisfied.[1]

Proposition 57 and SB 1391

As noted, J.R. was 14 years old when he committed the underlying offenses. He was prosecuted as an adult pursuant to former Welfare and Institutions Code section 707, subdivision (d), which gave prosecutors discretion under specified circumstances to file charges against a minor directly in a court of criminal jurisdiction, "a practice known as 'direct filing' or 'discretionary direct filing.' " (*People v. Cervantes* (2017) 9 Cal.App.5th 569, 596, partially disapproved of in *Lara*, *supra*, 4 Cal.5th at pp. 314–315 (*Cervantes*).) Proposition 57, enacted by the electorate in November 2016, abolished the direct filing procedure.

"While prosecuting attorneys may move to transfer certain categories of cases to criminal court (Welf. & Inst. Code, § 707, subd. (a)(1)), they [no longer have] authority to directly and independently file a criminal complaint against someone who broke the law as a juvenile, even by committing the crimes that previously qualified for mandatory direct filing. In cases where transfer to adult court is authorized …, the juvenile court now has sole authority to determine whether the minor should be transferred. [Citations.] Thus, Proposition 57 effectively guarantees a juvenile accused felon a right to a fitness hearing before he or she may be sent to the criminal division for prosecution as an adult." (*Cervantes*, *supra*, 9 Cal.App.5th at pp. 596–597, fn. omitted.)

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[1] The People alleged that three factual circumstances constituted overt acts in furtherance of the conspiracy: "[(1)] Kenneth Hernandez traded one car for a red Jeep Wrangler in order to take [J.R.] and others to the scene of a shooting[;] [(2)] Kenneth Hernandez drove the Jeep and [J.R.] shot at victims …[;] [(3)] Kenneth Hernandez attempted to secrete the red Jeep by returning it to the rental agency in another city." On appeal, J.R. contends the first allegation was unproven and the third allegation does not qualify as an overt act in furtherance of the conspirators' unlawful agreement. Although we agree with him on both points, the jury's consideration of misguided overt act allegations does not invalidate its verdict. (*People v. Jurado* (2006) 38 Cal.4th 72, 122.) The fact J.R. shot at the victims is enough to satisfy the overt act requirement. (See *ibid*; *People v. Alleyne* (2000) 82 Cal.App.4th 1256, 1262.)

In supplemental briefing, the parties address whether the provisions of Proposition 57 that prohibit direct filing of criminal charges against juveniles can be applied retroactively. The California Supreme Court's decision in *Lara*, *supra*, answers this question in the affirmative. Citing the reasoning articulated in *In re Estrada* (1965) 63 Cal.2d 740, *Lara* holds that while Proposition 57 does not mitigate punishment for any particular crime, it does confer potential benefits to a class of persons, i.e., juveniles, and constitutes an " 'ameliorative change[] to the criminal law' that … the legislative body intended 'to extend as broadly as possible.' " (*Lara*, *supra*, 4 Cal.5th at pp. 303–304, 308–309.) It is now settled that Proposition 57 applies retroactively "to all juveniles charged directly in adult court whose judgment was not final at the time it was enacted." (*Id*. at p. 304.)

In terms of remedy, the *Lara* opinion tacitly endorses a remand procedure described by the Fourth District Court of Appeal in *People v. Vela* (2017) 11 Cal.App.5th 68 (*Vela*). (*Lara*, *supra*, 4 Cal.5th at pp. 310, 313 ["we believe remedies like those provided in *Vela* … are readily understandable, and the courts involved can implement them without undue difficulty"].) In those cases to which Proposition 57 applies retroactively, a juvenile offender previously subjected to the direct filing procedure may obtain a conditional reversal of the resulting judgment and have his or her case remanded to the juvenile court for a transfer hearing under the current law. (*Lara*, *supra*, 4 Cal.5th at p. 310.)

" 'When conducting the transfer hearing, the juvenile court shall, to the extent possible, treat the matter as though the prosecutor had originally filed a juvenile petition in juvenile court and had then moved to transfer [the] cause to a court of criminal jurisdiction. ([Welf. & Inst. Code,] § 707, subd. (a)(1).) If, after conducting the juvenile transfer hearing, the court determines that it would have transferred [the defendant] to a court of criminal jurisdiction because he is "not a fit and proper subject to be dealt with under the juvenile court law," then [his] convictions … are to be reinstated. ([Welf. &

Inst. Code,] § 707.1, subd. (a).) On the other hand, if the juvenile court finds that it would *not* have transferred [him] to a court of criminal jurisdiction, then it shall treat [his] convictions as juvenile adjudications and impose an appropriate "disposition" within its discretion.' " (*Lara*, *supra*, 4 Cal.5th at p. 310, quoting *Vela*, *supra*, 11 Cal.App.5th at p. 82.)

Effective January 1, 2019, SB 1391 amended Welfare and Institutions Code section 707, subdivision (a)(1), to read: "(1) In any case in which a minor is alleged to be a person described in Section 602 by reason of the violation, when he or she was 16 years of age or older, of any offense listed in subdivision (b) or any other felony criminal statute, the district attorney or other appropriate prosecuting officer may make a motion to transfer the minor from juvenile court to a court of criminal jurisdiction. . . . [¶] (2) In any case in which an individual is alleged to be a person described in Section 602 by reason of the violation, when he or she was 14 or 15 years of age, of any offense listed in subdivision (b), but was not apprehended prior to the end of juvenile court jurisdiction, the district attorney or other appropriate prosecuting officer may make a motion to transfer the individual from juvenile court to a court of criminal jurisdiction." (Stats. 2018, ch. 1012, § 1.)

Summarized, the new legislation "repeal[s] the authority of a district attorney to make a motion to transfer a minor from juvenile court to a court of criminal jurisdiction in a case in which a minor is alleged to have committed a specified serious offense when he or she was 14 or 15 years of age, unless the individual was not apprehended prior to the end of juvenile court jurisdiction, thereby amending Proposition 57." (Legis. Counsel's Dig., Sen. Bill No. 1391, 9 Stats. 2018 (2017–2018 Reg. Sess.) Summary Dig., p. 1013.) The People acknowledge the lone exception does not apply in this case and also concede the issue of retroactivity. Given the California Supreme Court's analysis in *Lara* with regard to Proposition 57, we accept the concession as appropriate. SB 1391 amended Proposition 57 by further "ameliorat[ing] the possible punishment for a class of

persons," namely juveniles who commit serious crimes before turning 16 years old. (*Lara, supra*, 4 Cal.5th at p. 308.) Therefore, "the same inference of retroactivity should apply." (*Ibid*.)

By retroactive application of SB 1391, J.R. cannot be prosecuted as an adult for the crimes he was found to have committed in this case. Similar to the remedy used in Proposition 57 cases, we will vacate his sentence, order his convictions to be deemed juvenile adjudications, and remand the matter to the juvenile court for a dispositional hearing. (See *Lara*, *supra*, 4 Cal.5th at pp. 309–310, 313.)

SB 620

On October 11, 2017, the Governor approved SB 620, which amended sections 12022.5 and 12022.53. (Stats. 2017, ch. 682, §§ 1, 2.) The legislation went into effect on January 1, 2018. Section 12022.53, subdivision (h) provides that trial courts may, in "the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."

J.R. argues, and the People concede, SB 620 applies retroactively to all nonfinal judgments. We accept the concession. (*People v. Phung* (2018) 25 Cal.App.5th 741, 763.) On remand, the juvenile court shall determine whether to exercise its discretion to strike one or more of the firearm enhancements pursuant to section 12022.53, subdivision (h).

Mooted Issues

Because J.R.'s criminal convictions will hereafter be treated as juvenile adjudications, his request for the trial court to make findings relevant to section 3051, which concerns youth offender parole hearings for defendants sentenced to life terms in prison, is moot. His claim of error regarding the trial court's failure to award presentence

conduct credits is also moot. Any issues concerning the time J.R. spent in custody while awaiting trial may be raised with the juvenile court on remand.

DISPOSITION

Appellant's sentence is vacated. We order his convictions to be deemed juvenile adjudications and remand the matter to juvenile court for dispositional proceedings.

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HILL, P.J.

WE CONCUR:

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PEÑA, J.

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SMITH, J.